RECORD AND BRIEFS

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In the
Supreme Court of the United States

JOSEPH JESNER, *et al.*,

Petitioners,

vs.

ARAB BANK, PLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* UNITED STATES SENATOR SHELDON WHITEHOUSE IN SUPPORT OF PETITIONERS

PROF. PETER MARGULIES
Counsel of Record
ROGER WILLIAMS UNIVERSITY
SCHOOL OF LAW
10 Metacom Avenue
Bristol, RI 02809
(401) 254-4564
pmargulies@rwu.edu

Of Counsel:
ANDREA BIERSTEIN
SIMMONS HANLY CONROY
112 Madison Avenue,
7th Floor
New York, NY 10016
(212) 784-6400
abierstein@simmonsfirm.com

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Statement of Interest[1]

This brief *amicus curiae* is respectfully submitted by Senator Sheldon Whitehouse (D-RI). As a current member of the U.S. Senate Committee on the Judiciary, Senator Whitehouse is actively engaged in enactment of legislation, oversight of Executive Branch departments, and fact-gathering on foreign affairs and the financing of terrorism overseas. Senator Whitehouse has worked closely with constituents who have had family members killed in terrorism attacks, including the September 11, 2001 attacks and the October 3, 1983 Marine barracks bombing in Beirut, Lebanon, in which 241 Marines, including nine Rhode Islanders, were killed by a suicide bomber. Senator Whitehouse therefore understands the role U.S. courts play in helping victims hold sponsors of terrorism accountable for these heinous acts.

Recently, Senator Whitehouse participated in enactment of the Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. (September 28, 2016) (JASTA), available at https://www.congress.gov/114/bills/s2040/BILLS-114s2040enr.pdf. That legislation targets, *inter alia*, the contribution of "material support or resources, directly or indirectly, to persons *or organizations* that pose a significant risk of committing acts of terrorism that threaten ... the

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[1] Rule 37 statements: Petitioners Joseph Jesner, et al. filed blanket consents to the filing of *amicus* briefs. Respondent Arab Bank was timely notified and consented by letter to this filing. No counsel for any party authored any part of this brief and no person or entity other than *amicus* funded its preparation or submission.

national security, foreign policy, or economy of the United States." *Id.* at 2(a)(6) (emphasis added). It further expresses Congress's view that "civil litigants [should have] ... *the broadest possible basis* ... to seek relief against persons, *entities*, and foreign countries ... that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." *Id.* at 2(b) (emphasis added).

Senator Whitehouse, as a member of the Legislative Branch, believes that liability under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, for corporations that use U.S. operations to fund the murder of civilians abroad is an integral part of the backdrop for current legislation such as JASTA. The ATS, enacted during the United States' founding era, reflects the Framers' acknowledgment and Congress's longstanding view that the foreign policy of the United States must address dynamic conditions overseas. *Cf.* The Federalist No. 41, at 257 (James Madison) (Clinton Rossiter ed., 1961) (observing that American governance and policy must address the "ambition ... [and] exertions of all other nations"). To inform his deliberations as a legislator, Senator Whitehouse has elicited information and analysis from academic experts, concerned citizens and organizations, and members of the Executive Branch. Based on that investigation and deliberation, this brief explains why Senator Whitehouse believes that the decision of the court below barring ATS liability for financial entities that manipulate U.S. operations to support terror overseas created a dangerous gap in the United States' counterterrorism framework.

Summary of Argument

This Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in order to decide the extraordinarily important question of whether the ATS provides jurisdiction over actions against financial entities that use U.S. facilities to support terrorism. In holding that a financial entity that used U.S. facilities to launder payments to the families of suicide bombers was not a cognizable defendant under the Alien Tort Statute (ATS), the court below undermined Congress's comprehensive framework for deterring terrorism. *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 301(a)(2), 110 Stat. 1214, 1247 (1996) (AEDPA) (finding that since Congress has the "power to punish crimes against the law of nations and to carry out the treaty obligations of the United States," Congress may punish the "provision of material support to foreign organizations engaged in terrorist activity"). The holding of the court below also clashes with this Court's most recent guidance on the ATS and the decisions reached by other circuit courts.[2] The

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[2] *See Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1669 (2013) (in noting skepticism that "mere corporate presence suffices" for ATS liability, implying that more concrete corporate conduct would be cognizable); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *rev'd on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *see also Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014) (holding that, based *inter alia* on defendant's "status as a United States corporation," plaintiff's ATS claim "touch[ed] and concern[ed] the

importance of deterring financial support for terrorism does not hinge on the juridical form selected by entities that provide that support. Providing jurisdiction under the ATS for actions against *any and all* financial entities that use U.S. facilities to aid terrorism is vital to Congress's comprehensive plan for combating this international threat.

Amicus curiae submits, based on his experience as a member of the U.S. Senate, that Congress has painstakingly constructed the comprehensive scheme that the court below undermined. For twenty years, federal legislation has expressly stated that the financing of terrorism by individuals or entities is a violation of the law of nations. *See* AEDPA, 110 Stat. at 1247 (in authorizing expansion of both civil and criminal liability against financial support of terrorism, citing both Congress's authority to designate offenses against the law of nations under Define and Punish Clause and need "to carry out the treaty obligations of the United States").

Congress has long sought to deter both entities and individuals from providing assistance "at any point along the causal chain of terrorism." *See* S. Rep. No. 102-342 at 22 (1992). Legislative history affirms that this comprehensive scheme includes the Alien Tort

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territory of the United States"); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999) (in dismissing ATS suit for failure to state a claim, appearing to assume that court had jurisdiction over corporate defendants). Indeed, the panel decision of the court below acknowledged that this Court's decision in *Kiobel* "appears to suggest that the ATS allows for *some degree of corporate liability*." *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 155 (2d Cir. 2015); *rehearing denied*, 822 F.3d 34 (2016) (emphasis added).

Statute (ATS), 28 U.S.C. § 1350. *See* Antiterrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary, 101st Cong. 90 (1990) (hereinafter Subcommittee Hearing) (testimony of Joseph A. Morris, former General Counsel, U.S. Information Agency) (noting that proposed legislation, which became Anti-Terrorism Act, 18 U.S.C. § 2332 *et seq.* (ATA), would preserve ATS actions against "abuses of terrorism"). Dismantling the "foundation of money" and U.S.-based financial manipulation that supports international terrorism is crucial to this task. *Id.* at 84.

Congress has also worked closely with the Executive Branch to enhance remedies against state sponsors of terrorism and promulgate anti-terrorist financing measures in international agreements and organizations. As this Court recognized last Term, Congress has amended the Foreign Sovereign Immunities Act (FSIA) to provide civil remedies to victims injured by state sponsors of terrorism, such as Iran. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016). In addition, the U.S. Senate has approved the Convention on the Suppression of the Financing of Terrorism. Dec. 9, 1999, 2178 U.N.T.S. 229. *See* Suppression of the Financing of Terrorism Convention Implementation Act of 2002, Pub. L. No. 107-197, §§ 201-203, 116 Stat. 721, 724-28 (2002); 18 U.S.C. § 2339C. Furthermore, Congress has supported successive administrations in sponsoring resolutions to deter terrorist financing at the United Nations Security Council. *See, e.g.*, S.C. Res. 2255, U.N. Doc. S/RES/2255 (Dec. 21, 2015); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 4, 2004); S.C. Res. 1373,

U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

ATS liability can help disrupt the winding path of U.S.-based financial aid to terrorism. Subcommittee Hearing at 135 (comment by Sen. Grassley) (citing "money-laundering schemes that have been operated in the United States" by terrorist groups and their affiliates, including "the use of apparently legitimate businesses as fronts"). Terrorists do not comply with fair accounting principles. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010) ("there is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations"); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004) ("terrorist organizations can hardly be counted on to keep careful bookkeeping records"). ATS actions can trace the sources of terrorist funding in the U.S. and deter the lethal legerdemain practiced by terrorism's financial enablers.

ATS liability for financial entities that use U.S. operations to fund terror will aid Congress's comprehensive plan. Congress has repeatedly acted to close gaps in the deterrence of terrorism. *See, e.g.*, Committee on the Judiciary, U.S. House of Representatives, 102d Cong., 2d sess., H. Rep. 102-240, at 5 (1992) (noting that Antiterrorism Act was enacted to address a "gap in our efforts to develop a comprehensive legal response to international terrorism"). The ATS is the sole basis for civil actions against financial entities that use U.S. operations to

aid terrorist activity that injures or kills foreign nationals overseas. Indeed, specific allegations that the defendant entity used its U.S. office to launder funds for Hamas are at the very core of this case. *See In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 150 (2d Cir. 2015) (noting allegations that, *inter alia*, defendant engaged in "routing the transfers [of money for the families of Hamas suicide bombers] through its New York branch in order to convert Saudi currency into Israeli currency"); *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 328-29 (E.D.N.Y. 2015) (holding that evidence at trial was sufficient to permit a reasonable jury to find these facts). The absence of ATS liability for such U.S.-based financial chicanery will weaken the structure of deterrence that Congress has designed. Instead of strengthening remedies at each point along terrorism's "causal chain," the court below inserted a dangerous gap that terrorists and their funders may exploit.

A textual analysis also reinforces reading the ATS to encompass jurisdiction over actions against financial entities that use U.S. facilities to support terror. As Justice Frankfurter noted over half a century ago, "words of art" across statutes should generally receive a consistent reading. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). The phrase, "law of nations," used in both AEDPA and the ATS, is a term of art for international law. Pursuant to this canon, the range of parties contemplated under the ATS should track the parties identified under AEDPA, including terrorists' financial enablers.

Argument

I. The ATS is a Key Part of Congress's Comprehensive Framework to Deter Terrorist Financing That Uses U.S. Facilities

Practical, textual, and historical arguments support holding that the ATS's jurisdictional grant encompasses actions against financial entities that launder terrorist funds in the United States. As a practical matter, Congress has long recognized that attacking terrorism's "causal chain" requires a dense latticework of deterrence. *See* S. Rep. No. 102-342 at 22. That latticework has myriad interlocking parts. Removing one slat from the framework opens a gap that frustrates Congress's design.

In AEDPA, Congress targeted the financial enablers of terrorism, prohibiting the knowing "provision of material support or resources" within the U.S. to either specific terrorist activity or groups designated as foreign terrorist organizations by the Secretary of State. *See* 18 U.S.C. § 2339A; *id.*, § 2339B; *see also id.*, § 956(a)(1) (in provision cross-referenced in § 2339A, prohibiting conspiracies in the U.S. to, *inter alia*, "commit at any place outside the United States an act that would constitute the offense of murder"). Pursuant to AEDPA, the United States has prosecuted both individuals and organizations for money laundering, fundraising, and other material support of foreign terrorist groups. *See, e.g.*, *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (upholding convictions of both purported charity and individuals that knowingly provided financial support to intermediaries on behalf of Hamas).

AEDPA broadened the civil deterrent that Congress had already provided in an earlier statute, the Anti-Terrorism Act (ATA), 18 U.S.C. § 2332 *et seq.*, that authorizes actions by U.S. nationals victimized by acts of "international terrorism," *see* 18 U.S.C. § 2333(a), to impose liability on financial enablers of terrorism "where it hurts them the most: at their lifeline, their funds." 136 Cong. Rec. S14279-01 (daily ed. Oct. 1, 1990); 137 Cong. Rec. S4511-04 (daily ed. Apr. 16, 1991) (remarks of Sen. Grassley). Congress defined "international terrorism" to include "activities that ... involve acts *dangerous to human life* that are a violation of the criminal laws of the United States." 18 U.S.C. § 2331(1) (emphasis added). The financing of attacks on civilians is surely just such an activity, as the Seventh Circuit, in an opinion by Judge Posner, has found. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690 (7th Cir. 2008) (en banc). As Judge Posner aptly observed, "[g]iving money" to a foreign terrorist group, like "giving a loaded gun to a child," is an "act dangerous to human life" for which Congress intended to provide both criminal penalties and civil remedies. *Id.*; *see also id.* at 691 (finding that "suits against financiers of terrorism can cut the terrorists' lifeline").

Influential testimony on the bill that became the ATA demonstrated to Congress that the Alien Tort Statute (ATS) authorizes actions against both entities and individuals that provide U.S.-related financial support to terrorist activity, including the money laundering in the U.S. at issue in this case. In declaring its intention to deter both entities and individuals from providing aid "at any point along the causal chain of terrorism" and to thereby "interrupt, or at least imperil, the flow of money" for terrorist

acts, S. Rep. No. 102-342 at 22, Congress adopted both the rationale and the *precise language* used by a distinguished witness, former U.S. Information Agency counsel Joseph A. Morris. *See* Subcommittee Hearing at 84 (observing that the "imposition of liability at any point along the causal chain of terrorism ... would interrupt, or at least imperil, the flow of terrorism's lifeblood: money"). Morris's testimony, which became a template for Congress's efforts, also singled out the importance of ATS jurisdiction.

In his persuasive testimony, Morris advised Congress that in his view the ATS encompasses "rights of action against the more egregious abuses of terrorism." Subcommittee Hearing at 90. Urging that Congress enact the set of remedies for *U.S. nationals* that became the ATA, Morris also stressed that, under the ATA, ATS remedies "would be preserved" for foreign nationals who were victims of terrorism. *Id.* For Morris, the ATS and the bill that became the ATA were complementary: each eroded the "foundation of money" that supports international terrorism through U.S. financial operations. *Id.* at 84. As a member of the U.S. Senate, *amicus curiae* shares Morris's perspective.

II. Textual Canons Support Reading the ATS to Encompass Suits Against Financial Entities That Use U.S. Operations to Support Terrorism

Textual canons also support construing cognizable ATS defendants to include financial entities that use U.S. facilities to support terror. Congress relies on interpretive canons, such as Justice Frankfurter's recommendation that "words of art" receive a consistent reading. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) (noting that terms of art "bring their art with them ... [t]hey bear the meaning of their habitat"). The phrase, "law of nations," used in both AEDPA and the ATS, is a term of art for international law, which Justice Story confirmed long ago was understood by the Framers to be both subject to evolution and amenable to definition by Congress. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (explaining that the Define and Punish Clause stemmed from the Framers' view that, since the "law of nations" could not be "completely ascertained and defined ... there is a peculiar fitness in giving [Congress] the power to define as well as to punish" offenses against the law of nations).

While the ATS was enacted in 1789, it is entirely appropriate to define permissible parties under the ATS with reference to acts, such as the use of U.S. operations to finance the murder of innocents abroad for political purposes, that Congress in a more recent enactment has declared to violate international law. *Cf.* Frankfurter, *supra*, at 543 (noting that later statutes may "'throw a cross light' upon an earlier enactment") (citation omitted).

III. Stopping the Flow of Money to Terrorist Groups Requires an ATS Remedy

As Congress recognized in AEDPA's material support provisions, the complexity of many terrorist attacks requires recruitment, financing, and logistical aid from entities, not merely individuals. Financial aid, like that allegedly provided by the defendants in this case, can take a complex path to avoid detection. Subcommittee Hearing 135 (comment by Sen. Grassley) (citing "money-laundering schemes that have been operated in the United States" by terrorist groups and their affiliates, including "the use of apparently legitimate businesses as fronts"). Moreover, Congress has long been aware that U.S. instrumentalities, such as the New York branch office maintained by the defendants in this case, can materially assist in the funding of terrorism. *Id.* at 135 (testimony of Daniel Pipes) (identifying the defendant as "by far the most powerful financial organization" linked to terrorism and citing its New York office as key to its role). Jurisdiction under the ATS that reaches such conduct furthers Congress's comprehensive framework.

Congress drafted the ATA as a "powerfully broad" complement to the ATS, "reaching behind the terrorist actors to *those who fund and guide and harbor them*." Subcommittee Hearing at 136 (testimony of Joseph A. Morris) (emphasis added). As Daniel Pipes, an expert on terrorism who also testified before Congress on the ATA, put it, "from a policy point of view ... it is absolutely critical to go after the funds because he who controls the funds controls the organization ... [o]ne must strike at the heart of the organization, and that means going after the

funding." *Id.* at 110. Congress well understood that achieving that vital goal entailed liability under both the ATA *and* ATS for financial entities facilitating terrorist attacks like the attack in this case.

The special payments to the families of suicide bombers ("martyrs," in the terrorists' perverse parlance) that the defendants in this case allegedly helped collect and launder illustrate the need to deter terrorist financing. *See Arab Bank*, 808 F.3d at 149 (providing a detailed account of the plaintiffs' allegations). As Judge Posner found in *Boim*, those payments are a vital tool in the recruitment and retention of terrorist operatives. Payments to the families of so-called "martyrs" give operatives a strong financial incentive to do terrorist leaders' bidding. 549 F.3d at 698 (observing that for a terrorist group such as Hamas, martyr payments to families "make it more costly" for operatives to leave the group, since their families would then "lose the material benefits" that the group showers on their families); *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 329 (E.D.N.Y. 2015) (jury could reasonably find that "the prospect that the families of dead Hamas terrorists would be financially rewarded was a substantial factor in increasing Hamas' ability to carry out attacks").

The power of such financial machinations and their connection to the U.S. are amply illustrated by the specific allegations discussed extensively in the panel opinion of the court below. The defendant, using a New York branch that offered clearing and correspondent banking services, allegedly "deliberately helped ... terrorist organizations [including Hamas, Palestinian Islamic Jihad, the Al Aqsa Martyrs' Brigade, and the Popular Front for the

Liberation of Palestine] and their proxies to raise funds for attacks and make payments to the families" of suicide bombers. *Arab Bank*, 808 F.3d at 149-50.

The elaborate process of financial support engaged in by the defendant started with its branches in Beirut and the Gaza Strip, where it maintained funds for Hamas accounts. *Id.* at 150. To ensure that the families of so-called "martyrs" received the special payments earmarked for them, the defendant received transfers from Saudi funds in the names of the beneficiaries. *Id.* It then routed the wire transfers through its New York branch, where it laundered the payments, changing Saudi currency into Israeli currency that would pass regulators' scrutiny. *Id.* Finally, the defendant made the payments, when claimants furnished the documentation that the defendant had specified. *Id.* This suite of services – including the use of facilities in the U.S. – was *exactly* the kind of lethally effective financial assistance to a terrorist entity that Congress has diligently sought to deter. *Cf. Licci v. Lebanese Canadian Bank, SAL*, 2016 U.S. App. Lexis 15557, at 29-34 (2d Cir. Aug. 24, 2016) (finding that defendant's provision through its New York correspondent bank of wire transfers that benefited Hezbollah established sufficient nexus with the U.S. under ATS); *but see id.* at 41-42 (dismissing ATS claim solely because defendant was a corporation).

Because of the serpentine path that terrorist financing often takes, Congress recognized that the coordination required to disrupt financial facilitation entailed a major commitment from both government and the victims of terrorism. Detecting, mapping, and disrupting the interlocking financial relationships

that allow terrorist groups to motivate their suicide bombers – for example by "martyr" payments to families – requires a sustained effort. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010) ("terrorist groups systematically conceal their activities behind charitable, social, and political fronts") (citation omitted). Navigating the money trail requires not merely the criminal and civil enforcement resources of the U.S. and other governments, but also private efforts.

Given Congress's judgment that such comprehensive efforts are necessary, it would be both dangerous and self-defeating for Congress to exempt terrorist funders that happened to take a particular juridical form. Corporate entities, for example, possess the scale and expertise to devise convoluted financial stratagems that aid terrorism. *See Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 37, 48 (E.D.N.Y. 2007) (compelling discovery against global financial entity based on entity's maintenance of bank accounts in England for putative charity that U.S. government had found to be a "'principal' conduit" used by Hamas to "'hide the flow of money'"). To be comprehensive, Congress's framework includes juridical persons such as corporate entities, as well as other organizations and associations. *See, e.g.*, *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (upholding convictions of both putative charity and individuals who knowingly provided financial support to foreign terrorist group). The court below failed to acknowledge that exempting corporations from Congress's plan would leave gaps in the United States' comprehensive counterterrorism framework. Those gaps would transform Congress's solid anti-terrorism architecture into a patchwork of ill-fitting parts.

Because of the need to deter funding of foreign terrorist organizations, imposing limits on ATS jurisdiction that track the limits in the Torture Victims Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350, would clash with Congress's overall counterterrorism plan. In the TVPA, Congress expressly limited cognizable defendants to "individual[s]." *Id.*, § 2(a); *cf. Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708-09 (2012) (holding that statutory term, "individual," refers only to natural persons, not entities). However, the TVPA's limits address distinctive issues not relevant to the ATS.

The TVPA's limits stem from the interaction between parties responsible for torture and the background principle of foreign sovereign immunity. *See Samantar v. Yousuf*, 560 U.S. 305, 313-19 (2010). Cases under the TVPA typically entail allegations against government officials. *See Yousef v. Samantar*, 699 F.3d 763, 766 (4th Cir. 2012) (noting allegations that defendant directed government agents to engage in torture of political opponents). Indeed, the administration of President George H.W. Bush opposed the bill that became the TVPA precisely because it might interfere with the "conduct of foreign countries and their officers." *See* Torture Victim Protection Act of 1989: Hearing on S. 2465 before the Subcomm on Immigr. & Refugee Affairs of the S. Comm. on the Judiciary, 101st Cong. 9-10 (1990) (testimony of John O. McGinnis, Dep. Ass't Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice); *id.* at 19 (testimony of David Stewart, Ass't Legal Adviser for Hum. Rts. & Refugee Affairs, U.S. Dep't of State) (expressing concern about impact on "foreign governments or officials"). Congress's express limit on

liability under the TVPA to "individual[s]" reconciled the statute with the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.*, which bars most suits against foreign states or state entities. *See id.*, § 1603.

Since torture is a violation of a fundamental *jus cogens* norm, international law regards it "by definition" as an act that is "*not* officially authorized by the Sovereign" and hence does not trigger sovereign immunity. *See Samantar*, 699 F.3d at 776 (emphasis added). Imposing liability for torture only on *individual* officials under the TVPA was therefore completely consistent with both the facts of torture cases and with international law.

The ATS contains no such express limit, and the liability of non-state entities does not clash with the principle of foreign sovereign immunity. Indeed, as Congress has specifically provided, both natural persons *and* entities supply material support to foreign terrorist groups and should be accountable for that conduct. *See* ATA, 18 U.S.C. § 2333(d)(1) (establishing liability for "any person who ... knowingly provid[es] substantial assistance to ... an act of international terrorism"), citing 1 U.S.C. § 1 (defining "person" to include, *inter alia*, "corporations, companies, associations, [and] firms"). Cognizable defendants in ATS actions based on acts of international terrorism should track the broad range of defendants, including both natural persons and entities, cognizable in actions under the ATA.

IV. The Ruling of the Court Below Leaves a Serious Gap in the U.S. Framework for Encouraging Global Cooperation to Deter Terrorist Financing

The holding of the court below creates a troubling gap in U.S. global counterterrorism efforts. It also leaves a group of victims without a remedy. Each result undermines Congress's efforts to construct a comprehensive framework that deters the use of U.S. facilities for the financing of terrorist activity.

In deterring the use of U.S. financial operations that aid terrorism, jurisdiction under the ATS is a crucial supplement to the ATA. Because the ATA only provides a right of action for *U.S. nationals* injured abroad, it does not adequately deter financial entities that use U.S. operations to aid the terrorist killing of *foreign* nationals overseas. The absence of ATS jurisdiction would thus create a gap between remedies available to U.S. and foreign nationals, respectively. That gap would undermine Congress's express commitment to "international cooperation" in counterterrorism efforts. *See* AEDPA, § 301(a)(5), 110 Stat. 1247 (note following 18 U.S.C. § 2339B), cited in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 32 (2010).

As both Congress and this Court have long recognized, U.S. foreign policy hinges on reciprocity with other nations. Indeed, the Second Circuit, in a venerable decision upholding the Foreign Intelligence Surveillance Act against a challenge brought by convicted members of an international terrorist group, stated the point starkly: "[I]f other nations were to harbor terrorists and give them safe haven for staging terrorist activities against the United States,

United States national security would be threatened. *As a reciprocal matter*, the United States cannot afford to give safe haven to terrorists who seek to carry out raids against other nations." *United States v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (emphasis added). Under AEDPA, the very same analysis applies to the financial entities that exploit U.S. facilities to aid terrorist plots against other states' civilian populations.

A flagging U.S. commitment to extirpating U.S. financial support for terrorism will signal to other nations that international cooperation against terrorism is not worth the effort entailed. *See Humanitarian Law Project*, 561 U.S. at 32 (noting importance of global cooperation and need to assure allies of the United States' continuing dedication to this goal). Because of that dangerous signal, even financial support within the U.S. of terrorism that only harms other countries' civilians will ultimately redound to the detriment of the United States. ATS liability for such abuse of U.S. financial systems thus safeguards U.S. nationals by incentivizing global cooperation in counterterrorism efforts.

This Court has long recognized the importance of global cooperation against lawbreaking. In *United States v. Arjona*, 120 U.S. 479 (1887), the Court held that Congress had the power under the Define and Punish Clause to prohibit activity within the U.S. to counterfeit foreign currencies, whether or not such activity directly harmed U.S. individuals. The Court noted that such prohibitions served both international law and U.S. interests, since the U.S. benefited from the sound financial system that the deterrence of international counterfeiting fostered. *Id.* at 484 (citing

Vattel on the need for "wise and equitable commercial laws"). In this case, while without ATS jurisdiction financial entities supporting terrorism with U.S. facilities might still be subject to criminal prosecution, the absence of civil liability would remove a crucial implement from the counterterrorist toolkit. Jurisdiction under the ATS thus ensures that the U.S. has the full range of civil and criminal weapons available to combat international terrorism.

V. Congress Has Consistently Approved and Supported Transnational Measures to Deter Terrorist Financing

The framework of international cooperation that Congress and this Court have cited is not an abstract notion or a fleeting fancy: rather, it has yielded statutes and concrete agreements with practical effects. The implementation of those agreements is neither easy nor automatic. Moreover, Congress has enacted legislation to provide remedies against state sponsors of terrorism. All of these measures would appear far more feeble without the civil action supplement provided by ATS jurisdiction over actions against financial entities that use U.S. facilities to assist terrorist groups.

Twenty years ago, Congress modified the doctrine of foreign sovereign immunity by allowing civil actions by victims of terrorist attacks against state sponsors of terrorism such as Iran. *See* AEDPA, 110 Stat. 1214, 1241-43, § 221, 28 U.S.C. § 1605(a)(7). Congress has made those remedies more robust over time. For example, as part of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3, 338, § 1083 (Jan. 28, 2008), Congress enacted a new statutory provision, 28 U.S.C. § 1605A.

This provision created an express right of action against state sponsors of terrorism and authorized the award of punitive damages. Congress has also enacted legislation to target the U.S. assets of state sponsors of terrorism and ensure that victims have access to those assets. *Cf. Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (upholding legislation empowering federal courts to designate specific Iranian assets in the U.S. as subject to execution of judgment by victims of Iran-sponsored terrorist attacks).[3] The Second Circuit's contorted approach would hold individuals and even certain foreign governments liable for acts of international terrorism that violate customary international law, but would exempt "juridical entities" such as corporations that provide identical financial support to terrorist groups.

Moreover, the Second Circuit's approach would allow state sponsors to game the system, by funneling money into corporations that would act on terrorist groups' behalf. State sponsors of terror are adept at concealing their beneficial interest in private sector entities and assets. *See Bank Markazi*, 136 S. Ct. at 1319 (citing requirement in 22 U.S.C. § 8772(a) (2) that a court determine that Iran holds "equitable title to, or the beneficial interest in ... assets" prior to allowing execution of a judgment on those assets obtained by a victim of terrorism). Providing perverse

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[3] In September, 2016, Congress again demonstrated its resolve to hold sponsors of terrorism accountable, overriding a presidential veto to pass the Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. (September 28, 2016), available at https://www.congress.gov/114/bills/s2040/BILLS-114s2040enr.pdf.

incentives for such financial opacity is antithetical to Congress's plan.

To implement this plan on a global level, the U.S. has ratified and pushed for universal adoption of the United Nations' International Convention for the Suppression of the Financing of Terrorism, which requires nations who are a party to the treaty to "adopt effective measures for the prevention of the financing of terrorism...."[4] The Convention calls for prosecution of any person who "directly or indirectly ... provides or collects funds ... in order to carry out" terrorist bombings or any "other act intended to cause death or serious bodily harm to a civilian ... to intimidate a population, or to compel a Government" to omit or commit any act. *Id.* Furthermore, the Convention requires that each State party "enable a legal entity located in its territory or organized under its laws to be held liable" when that entity has financed terrorist activity. *Id.*, Art. 5(1). As of this writing, 187 states have become parties to this Convention. *See* Chapter XVIII: Penal Matters, 11. International Convention for the Suppression of the Financing of Terrorism, *United Nations Treaty Collection*, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&clang=_en (last visited September 28, 2016).

The United States also pressed successfully for the adoption of United Nations Security Council Resolution 1267, which aims to disrupt terrorist

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[4] International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/RES/54.109 (Dec. 9, 1999); GAOR, 54th Sess., Supp. No. 49, at 408, U.N. Doc. A/54/49 (Vol.I) (1999), entered into force April 10, 2002.

financing by imposing stiff sanctions on both persons *and* entities that provide such financial support. After the 9/11 attacks, the U.S. partnered with the rest of the Security Council to enact Resolution 1373, which supplemented the sanctions regime established under Res. 1267. Resolution 1373 called on U.N. member states to "complement international cooperation" on the prevention of terrorism by "taking additional measures to prevent and suppress ... through all lawful means, the financing and preparation of any acts of terrorism." *Id.* at 1. In addition, Resolution 1373 requires that member states "[p]rohibit ... entities ... from making any funds, financial assets or economic resources or financial or related services available, directly or indirectly, for the benefit" of "persons and entities" that commit terrorist acts. *Id.* at Art. 1(d). Prior to the issuance of Resolution 1373, the United States began designating individuals and entities as Specially Designated Global Terrorists under Executive Order 13224 (Sept. 23, 2001). *See* Office of Foreign Assets Control, *SDN by Programs*, https://www.treasury.gov/ofac/downloads/prgrmlst.txt (last visited Sept. 28, 2016) (showing designations by program including the SDGT program).

The U.S. is also a key member of the international Financial Action Task Force ("FATF"). FATF sets standards for its members' financial systems, in order to deter money laundering and counter terrorist financing.[5] FATF grades its many member states on

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[5] Financial Action Task Force on Money Laundering, The Forty Recommendations, June 20, 2003 (incorporating the amendments of October 22, 2004).

the effectiveness of their efforts at deterrence and transparency. Like the objectives driving other components of the comprehensive counterterrorism framework, FATF's guiding principles harmonize with ATS jurisdiction over financial entities whose use of U.S. facilities to fund terror injures foreign innocents abroad.

Conclusion:

This Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in order to decide the extraordinarily important question of whether the ATS provides jurisdiction over actions against financial entities that use U.S. facilities to support terrorism.

Respectfully submitted,

PROF. PETER MARGULIES
Counsel of Record
ROGER WILLIAMS UNIVERSITY
SCHOOL OF LAW
10 Metacom Avenue
Bristol, RI 02809
(401) 254-4564
pmargulies@rwu.edu

Of Counsel:
ANDREA BIERSTEIN
SIMMONS HANLY CONROY
112 Madison Avenue, 7th Floor
New York, NY 10016
(212) 784-6400
abierstein@simmonsfirm.com